IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 26, 2008 Session

STATE OF TENNESSEE v. JOSEPH BRENT PAINTER

Appeal from the Criminal Court for Carter County
No. S18541 Lynn W. Brown, Judge

No. E2007-01593-CCA-R3-CD - Filed July 22, 2008

Appellant, Joseph Brent Painter, pled guilty to one count of solicitation of a minor in violation of Tennessee Code Annotated section 39-13-528. At the sentencing hearing, Appellant sought judicial diversion and/or probation. The trial court denied both requests and sentenced Appellant to eleven months and twenty-nine days, with ten days to be served in confinement and the remainder of the sentence to be served on probation. Appellant appeals this decision. We determine that there was substantial evidence to support the trial court's denial of diversion and that the trial court did not err in denying full probation. Therefore, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Nat H. Thomas and Daniel B. Minor, Kingsport, Tennessee, for the appellant, Joseph Brent Painter.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Joe Crumley, District Attorney General; and Kenneth C. Baldwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Appellant was indicted by the Carter County Grand Jury in January of 2007 for one count of solicitation of a minor in violation of Tennessee Code Annotated section 39-13-528. In July of 2007, Appellant pled guilty to the charge. At the hearing during which the trial court accepted the guilty plea, Appellant testified that he was driving on Charlotte Drive in Elizabethton, Tennessee near Elizabethton High School when he saw a person walking down the street that looked to be over age eighteen. Appellant slowed down and asked the person if he wanted to engage in "sexual

penetration" in exchange for one hundred dollars.[1] Appellant admitted that he did not know the person. Both the State and Appellant stipulated that the facts would show that the person that was propositioned by Appellant was under eighteen years of age. The trial court accepted Appellant's guilty plea.

During the sentencing hearing, Captain Rusty Verran testified that he was involved in an investigation in 2003 that involved Appellant. According to Captain Verran:

> [He] was contacted by Chaplain [Harold] Mains [of Philadelphia Baptist Church] that three families had come to him with a problem, and it - - they didn't know if it was going to be of a criminal nature, so, I responded along with him down to this residence of one of the family members. And three - - three juveniles were there that made statements to me. One of the - - one of the juveniles stated that at one point that [Appellant] had - - that upon [Appellant's] request, two of them did, and one juvenile reported that he'd undressed for [Appellant] while spending the night at the [Appellant's] residence, but no contact was made between the two. At another incident the juvenile, the same juvenile stated, that [Appellant] - - he allowed [Appellant] to touch him around the waist, and he was - - he was asked to touch [Appellant] around the waist. But, they reported no erogenous zone - - zones was [sic] touched. And I conferred with our detectives at that time, and with - - your office and, you know, we - - we found that there was no crime occurred. The families were upset. They, in fact, I think one of them contacted the National Center for Exploitation of Children, and they contacted me. And, you know, I explained to them the circumstances of it. And Chaplain Mains had told me that [Appellant] had agreed to attend some counseling, and the case was closed at that point.

Harold Mains testified that he is a minister at Philadelphia Baptist Church in Elizabethton. According to Mr. Mains, Appellant and his parents were members of his church in 2003. Mr. Mains recalled a similar situation in 2003 involving Appellant. Mr. Mains was contacted by authorities and asked to meet with three families. After this meeting, Mr. Mains offered to counsel Appellant in hopes that Appellant could avoid criminal charges. Mr. Mains met with Appellant at the church and talked about the events that occurred between Appellant and several other minor males. Appellant agreed to undergo counseling. Mr. Mains offered to perform the counseling, and another member of the church offered to pay for it. Mr. Mains testified that shortly thereafter, Appellant and his family stopped attending the church. Mr. Mains was unaware if Appellant ever attended counseling.

Officer Ed McGee investigated the present charges against Appellant. Officer McGee and Captain Verran offered Appellant counseling, Appellant told them that he thought he needed counseling but not immediately. Appellant agreed to go to counseling. Officer McGee described the victim as a fourteen-year-old football player. The victim:

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[1] The trial court acknowledged that Appellant testified to facts that formed the basis for the uncharged offense of prostitution.

saw [Appellant] three times. . . . [Appellant] had stopped and asked him if he needed a ride. He said, no. He continued walking on up the hill. . . . And [Appellant] went up [in his car], turned around and come [sic] back, slowed down in front of the victim again. And as he turned onto Woodhaven off of Charlotte Drive up through there he came back and stopped right beside of him. And that's where the victim stated that [Appellant] offered him the money for sex.

Appellant took the stand at the sentencing hearing and testified that he was twenty-one years old and currently in school full-time at East Tennessee State University. In addition to full-time school, Appellant works full time for Holston Valley Broadcasting. Appellant informed the court that he is currently in counseling at Watauga Baptist Association and goes about once a week. Appellant testified that he started going to counseling because he thought he had a problem and needed help. Appellant stated that he wanted to change his lifestyle and that this is the last time that this will occur in his lifetime.

At the conclusion of the sentencing hearing, the trial court determined:

[T]he appellate courts have stated the criteria for judicial diversion. They're very similar to the ones for probation. And the first factor to be considered is the accused['s] amenability to correction. Well, we're not sure. He had a chance at getting into counseling and treatment early on as offered by Reverend Mains. He did not do so. . . . [Now Appellant is] not going to counseling very often. . . . [In a letter from the counselor it states that as of] December the 14th he's only seen him three more times [since September of that year]. So, amenability to correction is at best questionable. So, let's consider that a neutral offense. The second factor to be considered is the circumstances of the offense. He denies that he knew that the young man was a minor. There's a stipulation to the contrary. But, the testimony that he does admit he admits he committed a crime of solicitation for prostitution. So, there's actually two crimes that occurred. so, the circumstances of the offense are factors that weigh against him. His criminal history is really quite - - it is as good as it gets. He has no prior convictions, no record of juvenile court. He's not been in before. So, that's a factor that weighs very, very heavily in his favor. And his social history, except for the prior incident involving the three sons as testified, it's mixed. The court concludes that that is a neutral factor. But, he is doing well, apparently, in college, getting on with his life. Status of the accused['s] physical health, nothing in the record. Mental health, apparently, both good. The deterrence value to the accused as well as to others, ... Although, looking at that it appears that - - that on circumstances of the offense he made three attempts to solicit sex from this fourteen[-]year[-]old. So, looking at that and the additional offense of prostitution the circumstances of the offense weigh even more heavily against him. He just didn't try once, but he kept trying. The court finds that deterrence is appropriate because he's been counseled about it, and that this was an intentional knowing conduct. That

> by going back, going back, and three times attempting to arrange for sex with a fourteen[-]year[-]old deterrence[,] is a factor that fits, and very strongly, particularly, after he'd been warned. He had been in contact with the police. He had been referred to counseling by Mr. Mains, and this is a factor that weighs strongly against him - - very strongly. The last factor to be considered regarding judicial diversion is the interest of the public. And at this point with his having been told and warned it would appear to be in the interest of the public that he have a record, and that that follow him the rest of his life. Considering these factors the court is of the opinion that [Appellant] has not shown his suitability for judicial diversion, and a sentence of eleven months and twenty-nine days will be imposed. On your plea the court finds you guilty of solicitation of a minor. There is no presumption [sic] minimum in misdemeanor cases considering those same factors regarding probation. The court is of the opinion that he should be placed on probation for eleven months, and twenty-nine days, effective today, and that he should serve the next ten days in jail.
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> . . . .
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> He needs to have an evaluation to determine need for treatment, and then he must complete any treatment, or counseling recommended by the probation officer . . . . I don't think community service is appropriate. He is to stay strictly away from all minors.

Appellant filed a timely notice of appeal seeking our review of the trial court's denial of probation and judicial diversion.

Analysis

On appeal, Appellant challenges the trial court's denial of judicial diversion. Specifically, Appellant argues that the evidence in the sentencing hearing "preponderated in favor of the relief sought by" Appellant. The State disagrees.

According to Tennessee Code Annotated section 40-35-313, commonly referred to as "judicial diversion," the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A). A qualified defendant is one who:

> (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
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> (b) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and
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> (c) Has not previously been convicted of a felony or a Class A misdemeanor.

T.C.A. § 40-35-313(a)(1)(B)(i)(a), (b), & (c). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial court abused its discretion by denying the defendant's request for judicial diversion. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion include the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. *Cutshaw*, 967 S.W.2d at 343-44; *Parker*, 932 S.W.2d at 958. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as the defendant. *Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958; *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000).

After hearing the evidence, the trial court concluded that the circumstances of the offense weighed heavily against the grant of diversion but that Appellant's clean criminal history weighed in favor of the grant of diversion. The trial court noted Appellant's previous involvement in a similar situation and noted that his amenability to correction was "questionable" at best. The trial court also noted that Appellant had passed up one opportunity at counseling. However, the trial court concluded that the need for deterrence was high and that Appellant had not shown his suitability for judicial diversion. After reviewing the evidence presented to the trial court at the sentencing hearing, we determine that the trial court considered the necessary factors and that there was "substantial evidence" to support the trial court's denial of judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958. This issue is without merit.

Appellant next complains that the trial court erred in denying full probation. The State disagrees, contending that the record supports the trial court's sentencing determination.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. *See* T.C.A. § 40-35-302(b); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. *See State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998); *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). One

convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumptive sentence.[2] *See State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of service of the sentence. T.C.A. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. T.C.A. § 40-35-302(e). In determining the percentage of the sentence to be served in actual confinement, the court must consider the principles of sentencing and the appropriate enhancement and mitigating factors, and the court must not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2006).[3] A defendant is eligible for an alternative sentence if his sentence is less than ten years. T.C.A. § 40-35-303. "A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6).

In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

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[2] We note that this Court has held that "[t]he Sixth Amendment concerns expressed in *Blakely* [*v. Washington*, 542 U.S. 296 (2004)] are not implicated by [Tennessee's] misdemeanor sentencing scheme." *State v. Jeffery D. Hostetter*, No. M2003-02839-CCA-R3-CD, 2004 WL 3044895, at *9 (Tenn. Crim. App., at Nashville, Dec. 29, 2004), *perm. app. denied*, (Tenn., May 9, 2005).

[3] The 2005 amendment removed the language that provided that the described offenders were presumptively eligible for alternative sentencing in the absence of evidence to the contrary and made the guidelines "advisory" in nature. *See also State v. Stacey Joe Carter*, ___ S.W.3d ___, 2008 WL 2081247, at *10 (Tenn., May 19, 2008) (examining the effect of the 2005 amendments to the Sentencing Act on the determination of a defendant's suitability for probation). There was no presumption in favor of alternative sentencing for those convicted of misdemeanors. *See State v. Williams*, 914 S.W.2d 940, 949 (Tenn. Crim. App. 1995).

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). Furthermore, unless sufficient evidence rebuts the presumption, the trial court must presume that a defendant sentenced to ten years or less is an offender for whom incarceration would result in successful rehabilitation. *See* T.C.A. § 40-35-303(a).

Recently, in *State v. Stacey Joe Carter*, ___ S.W.3d ___, 2008 WL 2081247, at *10 (Tenn., May 19, 2008), the Tennessee Supreme Court examined the amendments to the Sentencing Act and reiterated that in regard to probation:

> [t]he Sentencing Act continues to provide that "the burden of establishing suitability for probation rests with the defendant." *Id.* § 40-35-303(b). This burden includes demonstrating that probation will "'subserve the ends of justice and the best interest of both the public and the defendant.'" *State v. Housewright*, 982 S.W.2d 354, 357 (Tenn. Crim. App. 1997) (quoting *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995)).

Furthermore, in *Stacey Joe Carter*, the court also noted that "[t]he 2005 amendments to the Sentencing Act did not alter the factors a trial court considers when deciding whether to suspend an eligible defendant's sentence." *Id.* at *11.

With that in mind, we note that Appellant herein pled guilty to solicitation of a minor, a Class A misdemeanor. He was eligible for probation. At the conclusion of the sentencing hearing, the trial court stated that it considered the presentence report, the prior criminal history and social history, along with the factors required for judicial diversion and determined that Appellant would not receive full probation. The trial court noted the potential problems with rehabilitation and mentioned the same factors that he reviewed in denying judicial diversion.

On appeal, Appellant seems to argue that a sentence of confinement would not have a deterrent effect within that jurisdiction. However, the requirement set forth in *State v. Smith*, 735 S.W.2d 859, 864 (Tenn. Crim. App. 1987), that there must be some evidence in the record to that effect only applies "[w]hen deterrence considerations are the sole basis for imposing a sentence of confinement . . . ." *State v. Claud Simonton*, No. W2004-02406-CCA-R3-CD, 2005 WL 2438395, at *5 (Tenn. Crim. App., at Jackson, Oct. 3, 2005) (citing *State v. Hooper*, 29 S.W.3d 1, 10 (Tenn. 2000)). As stated above, the trial court did not base its decision to deny probation solely on the deterrent effect within the jurisdiction.

Based on the foregoing and our review of the facts and circumstances of this case and Appellant, we determine that Appellant "has not carried his burden of establishing his suitability for probation and has not established that the suspension of his sentence serves the ends of justice or the best interest of the public." *Stacey Joe Carter*, ___ S.W.3d ___, 2008 WL 2081247, at *12; *see also State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10. There is evidence in the record to support the trial court's denial of total probation. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE